In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1271

KENNETH H. DOLLERIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court filed no opinion. The opinion of the court of appeals (Pet. 1a–9a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–9a) was entered on March 20, 1969. The petition was filed on April 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner properly preserved his objection to unsolicited testimony of a revenue agent that petitioner's counsel had, during interviews,

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warned him of his rights under the Fifth and Sixth Amendments.

2. Did the evidence warrant a finding that cash petitioner received from the sale of scrap was not reported in his income tax return.

STATEMENT

After a jury trial, petitioner was found guilty on all nineteen counts of an indictment which charged him, variously, with subscribing false income tax returns for himself and his corporation and with filing such returns with intent to evade and defeat the taxes due thereon for fiscal years ending in 1961 through 1965, in violation of Section 7201 and Section 7206 of the Internal Revenue Code of 1954. He was sentenced to a fine of $2,000 and imprisonment of one year and one day on each count, to be served concurrently. (R. 29–37, 403.)

Petitioner had made thirty-six sales of scrap on behalf of D. & W. Sales and Service, Inc., for which he requested and personally received $48,007.50 in cash from the purchasers. In ten of these transactions, part of the purchase price was, at petitioner's direction, paid by checks made out to the corporation, and in other instances of scrap sales the entire purchase price was paid by checks to the corporation. (R. 144, 148, 171–172, 287; Govt. Ex. 32.)

Revenue Agent Morgan testified that the records of the purchasers showed invoices for these sales and weight tickets made out on stationery of the D. & W. corporation. He also testified that while the D. & W. corporate records did reflect the payments received by

check and the weight tickets for such sales, they did not reflect the cash sales or the weight tickets relating thereto, and that such cash sales were not reported by the corporation or petitioner. (R. 246–247, 275–288.)

The accountant who prepared the tax returns (Oldham) testified that he prepared them on the basis of the records of bank deposits and oral statements of petitioner and his employees that all currency had been deposited. In an audit of currency for the thirty-nine month period ending on April 30, 1964, he determined that $13,185 in currency had not been reported in the tax returns. He accepted petitioner's explanation that this had been spent for unrecorded and undocumented company expenses, and Revenue Agent Morgan testified that this $13,185 was not included in his computations of unreported income. (R. 58–78, 88, 108–109, 292.)

When Special Agents of the Internal Revenue Service interviewed petitioner in his office in January and March of 1965, he answered their questions both personally and through his attorney. Thereafter, all answers were given by the attorney, who advised the agents that the missing records were not available, that the proceeds of all scrap sales had been recorded and the cash had been placed in a metal box from which it was removed and deposited when needed or used for deductible expenses. (R. 245–251.)

ARGUMENT

1. There is no merit to the contention (Pet. 9–12) that petitioner was deprived of his privilege not to incriminate himself. Although the petitioner quotes

various portions of the record,[1] his reliance is, as the court of appeals observed (Pet. 2a), essentially on the following testimony of Revenue Agent Morgan (R. 249–250):

> Q. All right. Now, did you meet them on or about October 18th, 1965?
>
> A. Yes. At that time Agent McLellan, Special Agent McLellan, was with me and we met Mr. Dolleris and Mr. Jones in Mr. Dolleris' office at D & W.
>
> Q. And what was the purpose of meeting with them?
>
> A. To discuss the examination.
>
> Q. Did you talk to Mr. Dolleris?
>
> A. Yes. And Mr. Jones advised Mr. Dolleris not to answer questions because they might be used against him. And at that time Agent McLellan stated that under the Constitution Mr. Dolleris had the right to refuse to answer any questions that he thought might incriminate him.
>
> Q. Was anything said about these scrap sales to Brodey & Brodey?
>
> A. Yes. We discussed this—Jones said that scrap sold to Brodey was weighed at D & W and picked up there by a Brodey truck. He said that Dolleris might have helped weigh the scrap and he said that he had the list of transactions which I had given him on March 17th, but he had not determined the cause of the discrepancies.

[1] "R." refers to the transcript of testimony and proceedings certified to this Court.

No objection was made at any time to this testimony in the trial court on the constitutional grounds now argued. By not giving the trial court an opportunity to evaluate his present contentions and to cure any possible prejudice, petitioner waived his objection, *Henry* v. *Mississippi*, 379 U.S. 443, 451 (see Pet. 3a), so that the issue was not properly preserved.

Furthermore, as the court of appeals held (Pet. 3a), this testimony was not elicited by the government. The prosecutor's question was "Did you talk to Mr. Dolleris?" and the answer "Yes" was responsive. The remainder of the answer was volunteered by the witness on a question that was neither objectionable nor objected to. Compare *Boeckenhaupt* v. *United States*, 392 F. 2d 24, 28 (C.A. 4).[2] The trial court, moreover, charged the jury in the usual manner that they should not consider or discuss the defendant's failure to take the stand (R. 399).[3]

2. Contrary to petitioner's contention (Pet. 13–14), the evidence fully warranted a finding that he did not report currency received for certain sales of

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[2] The court of appeals also was warranted in concluding that any possible error was harmless beyond a reasonable doubt. The jury was aware that after petitioner stopped answering questions, his attorney continued to supply factual explanations on his behalf both in and out of petitioner's presence, and his attorney advised the jury that he did this because of his client's right to counsel. (R. 362.)

[3] Petitioner's contention (Pet. 12) that it was erroneous to give this charge because he did not request it has no merit, especially in view of his failure to take any exception to the charge. *Bellard* v. *United States*, 356 F. 2d 437, 439 (C.A. 5), certiorari denied, 385 U.S. 856; *United States* v. *Schwartz*, 398 F. 2d 464, 469 (C.A. 7).

scrap. This contention is based entirely on summaries (R. 333–341) in which petitioner's accounting witness (Button) totalled all the currency deposits he found in the corporation's cash receipts journal and deposit tickets. But the jury was not compelled to conclude that Mr. Button's total of $51,286.51 necessarily includes the $48,007.50 in currency received from scrap sales. The schedules Mr. Button prepared assume that the company kept large amounts of cash on hand for extended periods, although his own auditor (Oldham) testified that he found no cash on hand in preparing certified audits for the period from January 31, 1962 to April 30, 1964. (R. 62–63; defendant's ex. 3–5).

Mr. Button admitted that in totalling the currency deposits he made no attempt to analyze the sources of this currency although he conceded that cash was received by the company from many sources other than sales of scrap. On the other hand, Revenue Agent Morgan testified that he had inspected the company records and analyzed the cash sales, and that his analysis showed sufficient accumulations of currency to account for cash deposits. (R. 245–246, 304–306, 342, 348–349.)

CONCLUSION

The petition should be denied.

Respectfully submitted.

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